# Note

# A Delicate Balance: Extradition, Sovereignty, and Individual Rights in the United States and Canada

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## I. INTRODUCTION

Historically, extradition has been a reflection of, and an exercise in, the supremacy of the state over the individual.[1] A fugitive is by definition an affront to that supremacy, for such a person embodies the inability of the state to hold accountable someone who ostensibly has broken its legal code. Without prosecution there is criminal impunity, and that is seen as a direct challenge to the authority and sovereign duty of the state to protect its citizens.

1. Early case law suggests that extradition treaties are to be "liberally" construed in favor of extradition and that it is primarily a matter of politics. *See, e.g.*, Factor v. Laubenheimer, 290 U.S. 276, 293 (1933) (stating that "a narrow and restricted construction is to be avoided"); Canada v. Schmidt, [1987] 1 S.C.R. 500, 514, 524 (holding that extradition is "primarily an executive act," and "[t]he present system of extradition works because courts give the treaties a fair and liberal interpretation").

An extradition treaty provides a way to meet this challenge by giving states a mechanism to apprehend each other's fugitives.

Extradition treaties contain certain rights and protections that states agree should be provided to individual suspects. Because these treaty rights are generally limited, extradition suspects in the United States and Canada will often seek protections contained in the U.S. Constitution and the Canadian Charter of Rights and Freedoms. Both nations are exemplary in extending rights and protections domestically, but when it comes to extradition, Canadian and American courts have shown a willingness to deny even their own citizens basic constitutional rights. For example, many constitutional protections against improper arrest and detention possessed by defendants in U.S. domestic cases are rarely extended to international fugitives. This is the case even if the suspect is an American citizen. In Canada, Charter rights guaranteeing a speedy trial or protection against double jeopardy are often suspended when individuals, including Canadian citizens, are sought by another nation, especially when that nation is a friend and ally.

This Note examines the tension between sovereign interests and the protection of individual rights in the development and practice of extradition law in Canada and the United States. Specifically, it analyzes the relative importance of domestic and international law and public opinion in shaping the extradition jurisprudence of these two countries, through a comparative analysis of the process of extradition as it has played itself out in the United States and Canada over the last two hundred years. After examining contemporary American and Canadian court decisions, this Note claims that in both countries, judicial attitudes may be shifting in favor of implementing more extensive protections for individuals subject to extradition proceedings. The Note argues that this shift is due in part to the recognition of a nexus between an emerging new conception of sovereignty and expanded universal individual rights.

Developments in international law and institutions over the past fifty years suggest that certain rights are not only universal and inviolable, but also portable. Under this vision of international law, individuals should receive the same basic rights and protections in whatever jurisdiction they find themselves.

Within the larger debate on international law, writers have argued for some time now that the traditional concept of state sovereignty is often inapplicable to modern realities.[2] Acknowledging those arguments, this Note suggests that states must respect each other's changing interests and needs in order to move more effectively toward international recognition and protection of individual rights. An increase in the protections afforded to extradition suspects would be an early illustration of this trend.

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2. For recent discussions on the reconceptualization of state sovereignty in the modern world, see, for example, Richard Falk & Andrew Strauss, *Toward Global Parliament*, FOREIGN AFF., Jan.-Feb. 2001, at 212; Stephen Krasner, *Sovereignty*, FOREIGN POLICY, Jan.-Feb. 2001, at 20; Peter J. Spiro, *The New Sovereigntists*, FOREIGN AFF., Nov.-Dec. 2000, at 9; Martin Wolf, *Will the Nation-State Survive Globalization?*, FOREIGN AFF., Jan.-Feb. 2001, at 178; and Noam Chomsky, Sovereignty and World Order, Address at Kansas State University (Sept. 20, 1999) (on file with the Yale Journal of International law, *available at* http://www.lbbs.org/chomsky/).

## II. THE HISTORY OF EXTRADITION IN CANADA AND THE UNITED STATES

This section provides an overview of the fundamental principles of extradition in the United States and Canada, the substantive requirements each country must meet in making an extradition request, and the procedure that must be followed before a decision to surrender a suspect is granted. When reviewing the evolution of extradition law within Canada and the United States, it is important to keep in mind how the unique cultural and political history of each country has shaped its current approach to extradition.

In the United States, the courts traditionally look to the Constitution and the country's own history for the legal rationale to support their decisions. American courts may look abroad to other common law jurisdictions for guidance, but rarely will they allow the legal principles or precedents of those jurisdictions to control their decisions.[3] Canada, on the other hand, looks not only to its own history and Constitution, but also to international law and political opinion for guidance, at times even treating them as compelling authorities. For example, a decision earlier this year that overturned twenty years of case law—denying an extradition request by the United States—was justified in part by legal and political changes that occurred internationally.[4]

The willingness of Canada, and the reluctance of the United States, to consider developments in international law when creating or reassessing domestic extradition law are explained in part by the cultural and political history of the two nations. In 1776, the British American colonies that would later become the United States broke from their European masters in a dramatic and complete way. The portion of North America that was later to become Canada, however, did not formally separate from the "motherland" for at least another 206 years.[5] In the interim, Canada continued to look to Britain to help define its social and legal character, especially with respect to its relations with other states. It is not surprising, then, that today, Canadian courts continue to look outward to the international community to help determine domestic legal reality, while U.S. courts largely ignore international developments and look instead to their own Constitution, jurisprudence and political system.

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3. *Editor's note*: A striking exception to the general reluctance of U.S. courts to consider developments in international law is seen in the line of cases started by *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), which grant U.S. civil remedies for victims of violations of internationally recognized human rights. The *Filártiga* court held that relatives of a young man tortured to death in Paraguay by a Paraguayan police officer could obtain damages for this violation of international law. No extradition was at issue—Peña-Irala came to the United States and was living in New York City when the case was filed. *Id.* at 878-80. For an analysis of this line of cases, see Beth Stephens, *Translating* Filártiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1 (2001).

4. United States v. Burns, [2001] 1 S.C.R. 283 (Can.).

5. Brian Dickson, *The Canadian Charter of Rights and Freedoms: Context and Evolution*, *in* GERALD BEAUDOIN & ERROL MENDES, THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS 1-2 (3d ed. 1996) ("On April 17, 1982, the Canadian Constitution was formally patriated, severing Britain's last legal . . . power of amendment over Canada's Constitution. An important part of this historic event was the entrenchment . . . of the *Canadian Charter of Rights and Freedoms*, a development that profoundly altered the Canadian constitutional mosaic."). Despite this formal declaration of independence from Britain, the Monarchy remains the titular head of Canada as a member of the Commonwealth. Thus, Canada's independence can be described more as an evolution than a revolution.

Political and cultural antecedents notwithstanding, the extradition regime has evolved considerably in the last two centuries.[6] Prior to the eighteenth century, extradition treaties were incidental to "treaties of peace and alliance" and often their primary purpose was to guarantee the surrender of political fugitives.[7] Today, however, political offenders are no longer extraditable,[8] and the general aim of modern extradition treaties has become the suppression of common crime.[9] This is not to say that extradition treaties today fail to cover persons accused of international crimes.[10] However, in general, these bilateral agreements have become vehicles for apprehending common criminals.[11]

Recent developments in international opinion suggest a discontinuity between what the global community has identified as basic universal rights and the rights individual nations are willing to include in bilateral agreements. Inherent in these developments is the search for a balance between national interests and individual rights as they are being redefined by international law.[12] There is also recognition that, for the present, sovereign states continue to be "the primary subjects of international law," while individuals continue to be "merely objects of international law."[13] In other words, although the balance may be shifting, individual rights remain secondary to state interests.

### A. *United States-Canada*

The first treaty regulating extradition between the United States and what is today Canada was the Jay Treaty of 1794, which was signed between the United States and Great Britain and allowed for the extradition of fugitives accused of murder or forgery.[14] The signatory nations allowed the treaty to expire in 1807, having exercised the extradition provision only once.[15] In 1842, the United States and Great Britain signed the Webster-Ashburton

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6. GEOFF GILBERT, ASPECTS OF EXTRADITION LAW 9-11 (1991). There is some evidence of extradition treaties before the eighteenth century. It is generally agreed that the first treaty providing for extradition procedures was between Rameses II of Egypt and the Hittite prince Hattushilish III in 1280 B.C.

7. IVAN A. SHEARER, EXTRADITION IN INTERNATIONAL LAW 5 (1971).

8. *Id.*

9. *See* M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 830-33 (3d ed. 1996).

10. Richard A. Martin, *Problems in International Law Enforcement*, 14 FORDHAM INT'L L.J. 519, 519 (1990-91). Extradition treaties have become a particularly important tool for enforcing laws against crimes such as narcotics trafficking, money laundering, and terrorism.

11. GILBERT, *supra* note 6, at 1.

12. John Dugard & Christine Van den Wyngaert, *Reconciling Extradition With Human Rights*, 92 AM. J. INT'L L. 187, 187 (1998).

13. Sharon A. Williams, *Human Rights Safeguards and International Cooperation in Extradition: Striking the Balance*, 3 CRIM. L.F. 191, 222 (1992).

14. Treaty of Amity, Commerce, and Navigation, Nov. 19, 1794, U.S.-U.K., art. 27, T.S. No. 105 [hereinafter Jay Treaty]. The United States and Great Britain entered into the Jay Treaty after the American Revolutionary War.

15. Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 237, 304 (1990). Thomas Nash, using the alias Jonathan Robbins, was extradited by the United States to Britain in 1799, provoking outcry that then-U.S. President John Adams had sent a U.S. citizen into the arms of another country. Before being hanged by the British government later that year, however, Nash confessed that he was in fact Irish.

Treaty, which attacked the slave trade and expanded the list of extraditable crimes to include murder, piracy, arson, robbery and forgery.[16]

When Canada gained its independence in 1867, it succeeded to the Webster-Ashburton Treaty. Over the next century, Canada and the United States extended the implications of the Treaty through a variety of conventions,[17] culminating in a new and separate treaty in 1971.[18] The 1971 Treaty was a turning point in the Canada-U.S. extradition regime. This agreement reflected a desire by both countries to simplify and facilitate the process of extradition.[19] It also marked the period when the two countries began to recognize a greater need to safeguard at least some rights of the accused. This pattern continued with subsequent amendments in 1976, 1988, and 1991. In each case, measures were taken to create better comity between the two countries as well as to provide fugitives with better legal protections. Changes were also occurring in the substantive requirements for extradition demanded by each nation.

### B. *Substantive Requirements for Extradition*

One of the more significant protections introduced in the 1971 Treaty was the article 6 limitation on the extradition of fugitives facing the death penalty. Article 6 provides that:

> When the offense for which extradition is requested is punishable by death under the laws of the requesting State and the laws of the requested State do not permit such punishment for that offense, extradition may be refused unless the requesting State provides such assurances as the requested State considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.[20]

The next substantive change to the Canada-U.S. treaty occurred in the 1988 Protocol.[21] In this amendment to the 1971 Treaty, the requirement that

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16. Treaty on Boundary, Slave Trade, and Extradition, Aug. 9, 1842, U.S.-U.K., art. X, T.S. No. 119 [hereinafter Webster-Ashburton Treaty]. Although crimes associated with the slave trade were not extraditable until 1889, the Webster-Ashburton Treaty served to suppress the slave trade indirectly and was used to prosecute those involved with the slave trade who tried to seek refuge in Canada. *See* Rita Patel, *One More Effect of NAFTA—A Multilateral Extradition Treaty?*, 14 DICK. J. INT'L L. 153, 157 (1995).

17. Extradition Convention, July 12, 1889. U.S.-U.K., T.S. No. 139; Supplementary Extradition Convention, Dec. 13, 1900, U.S.-U.K., T.S. No. 391; Convention on Suppression of Smuggling, May 18, 1908, U.S.-U.K., T.S. No. 502; Supplementary Extradition Convention, May 15, 1922, U.S.-U.K., T.S. No. 666; Extradition on Account of Crimes or Offenses Against Narcotic Laws, Jan. 8, 1925, U.S.-U.K., T.S. No. 719; Supplementary Convention, Oct. 26, 1951, U.S.-Can., T.I.A.S. No. 2454.

18. Extradition Treaty, Dec. 3, 1971-July 9, 1974, U.S.-Can., 27 U.S.T. 983 [hereinafter 1971 Treaty]. The U.S. ratified the 1971 Treaty in 1975. It became effective in 1976.

19. James D. McCann, United States v. Jamieson: *The Role of the Canadian Charter in Canadian Extradition Law*, 30 CORNELL INT'L L.J. 139, 143 (1997).

20. 1971 Treaty, *supra* note 18, art. 6. It was the United States that requested this provision. Ironically, at the time the treaty was negotiated, the practice of the death penalty in the United States was substantially curtailed in the aftermath of the U.S. Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972). Canada, on the other hand, continued to practice the death penalty. *See* Commons Debates, 34th Parl., 3rd Sess., 9421 (1992) (Can.) (Mr. Bill Domm, Conservative Member of Parliament).

21. Protocol Amending the Extradition Treaty, Jan. 11, 1988, U.S.-Can., S. TREATY DOC. NO. 101-17 [hereinafter 1988 Protocol].

extradition crimes be specifically enumerated was eliminated. It was replaced by a severity or "double criminality" requirement whereby "[e]xtradition shall be granted for conduct which constitutes an offense punishable by the laws of both Contracting Parties by imprisonment or other form of detention for a term exceeding one year or any greater punishment."[22] The 1988 Treaty also introduced provisions stating that extradition "shall not be granted" if the fugitive faces double jeopardy,[23] if prosecution is barred by the requesting state's statute of limitations,[24] or if the fugitive is apprehended by means of a bounty hunter.[25] The 1988 Treaty further provided that the domestic law of the contracting parties controls in the case of any conflict with Treaty obligations,[26] although, in practice, it was only rarely that either Canadian or U.S. domestic laws presented a real barrier to extradition.[27]

### C. *Procedure: General*

Extradition policies in both the United States and Canada grant significant leeway to the political branches of government. In the United States, the Constitution grants the Executive Branch primary jurisdiction in the area of making treaties, subject of course to ratification by the Senate.[28] When it comes to extradition, the Supreme Court has affirmed that it is the exclusive domain of the Executive Branch to determine the appropriate application of an extradition treaty.[29] In Canada, the approach is virtually identical. The Political Branch[30] draws its exclusive authority from the Extradition Act[31] and from a Supreme Court that has consistently deferred to the Executive in matters of foreign policy.[32]

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22. *Id.* art. 1.

23. *See* 1971 Treaty, *supra* note 18, art. 4(1)(i) ("When the person whose surrender is sought is being proceeded against, or has been tried and discharged or punished in the territory of the requested State for the offense for which his extradition is requested.").

24. *Id.* art. 4(1)(ii).

25. Marian Nash Leich, *Renunciation of Nationality*, 82 AM. J. INT'L L. 336, 336 (1988). The U.S. made a special commitment to stop civilian bounty hunters from kidnapping Canadians charged with or convicted of crimes in Canada.

26. *See* 1971 Treaty, *supra* note 18, art. 8 (stating that the decision to surrender a fugitive "shall be made in accordance with the law of the requested State," and the fugitive "shall have the right to use all remedies and recourses provided by such law").

27. *See* Canada v. Schmidt, [1987] 1 S.C.R. 500 (holding that in the case of an extradition from Canada, the requesting state need only make out a prima facie case).

28. U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . .").

29. United States v. Rauscher, 119 U.S. 407, 414 (1886) (stating that the power to extradite derives from the power to conduct foreign relations, reserved for the federal government by the Constitution).

30. The Executive branch of Canada is composed of three elements—the symbolic, the political, and the permanent—that work together to govern the country. The symbolic Executive is composed of the Queen, who is the legal head of state of Canada, and her representatives, who fulfill the monarch's daily duties in Canada. The political Executive is the leading element of the executive branch. The Prime Minister is the head of government, who chooses the other members of the Cabinet and the various Ministers. The bureaucracy represents the permanent Executive.

31. Extradition Act, S.C., ch. 18, §§ 1-30 (1999) (Can.), allows the Prime Minister broad discretion over whether to surrender a fugitive, and if so, on what terms. The Act is constitutionally valid, and it is generally for the Minister, not the court, to assess the weight of competing considerations. *See* United States v. Burns, [2001] 1 S.C.R. 283 (Can.).

32. In *Canada v. Schmidt*, [1987] 1 S.C.R. 500, 522 (Can.), Justice LaForest, writing for the majority, states that "[t]he judicial process in a foreign country must not be subjected to finicky evaluations against the rules governing the legal process in this country."

D. *Procedure: The United States*

Under current extradition practice, if an individual commits a crime in a foreign jurisdiction and then flees to the United States, the foreign country will notify the U.S. State Department, which will then assign the case to an Assistant U.S. Attorney, who will file a complaint against that individual. Once the extradition magistrate has issued an arrest warrant and the accused has been apprehended, the judge will conduct an extradition hearing to determine if the offense is extraditable under the applicable treaty. An offense is considered extraditable if it satisfies the "dual criminality" requirement that the conduct be unlawful both in the United States and in the requesting country, and if there is probable cause to believe that the accused committed the crime for which extradition is sought.[33] If the magistrate determines that the individual may legally be extradited, the matter is then turned over to the Secretary of State. If the State Department decides to proceed, the warrant is signed and the accused is surrendered. There is no appeal of a decision by the Secretary of State, save on humanitarian grounds or through political channels.

E. *Procedure: Canada*

The Canadian Supreme Court restricts itself to a limited role in executive decisions concerning extradition, primarily because the Canadian judiciary, like the American judiciary, subscribes to the belief that relations between nations are political in character and are best left to the executive actors.[34] In general, the process of extraditing a fugitive from Canada follows a series of steps that are similar to the American procedure. First, the requesting state must obtain a warrant for the fugitive's arrest. Once a suspect is apprehended, the judge will hold a hearing. The judge has authority only "to determine whether the relevant crime falls within the appropriate treaty and whether the evidence presented is sufficient to justify the executive surrendering the fugitive to the requesting country for trial there."[35] Upon committing a fugitive for extradition, the judge informs the suspect of his right to apply for habeas corpus relief, and then forwards the case to the Minister of Justice. While the Supreme Court has repeatedly stated that the Minister's surrender decision is subject to Charter limitations upon habeas review,[36] the reality has been that the possibility of obtaining habeas relief is virtually nonexistent. Between 1982, when the Canadian Charter of Rights and Freedoms was created, and February 2001, the Court had refused to reverse a single surrender order.[37] Despite the expansive paper rights

33. *See* 18 U.S.C. § 3184 (1994).

34. *Schmidt*, [1987] 1 S.C.R. at 519-20.

35. Argentina v. Mellino, [1987] 1 S.C.R. 536, 553-54 (Can.).

36. *Schmidt*, [1987] 1 S.C.R. at 521-22.

37. United States v. Burns, [2001] 1 S.C.R. 283, 356 (Can.) (holding that the Minister's decision not to seek assurances from the United States that it would not impose the death penalty on two Canadian teenage boys, wanted in connection with the murder of one of the boy's parents in the state of Washington, violated the Charter). *Burns* is the first time that the Canadian Supreme Court overruled a Minister's surrender order. Before that, the closest Canadian courts came was in *United States v. Jamieson*, [1994] R.J.Q. 2144 (Que. Ct. App.). In that case, a Quebec appellate judge overruled a

contained in the Extradition Treaty and the Charter, the process of extradition in Canada disposes of individual rights and liberties more than it protects them.

## III. EXTRADITION AND DEVELOPMENTS IN INTERNATIONAL LAW

In this Part, the impact of globalization and resulting international legal developments on the practice of extradition in Canada and the United States will be examined through the lens of each nation's domestic caselaw.

### A. *Canada*

From a constitutional point of view, Canada's coming of age vis-à-vis extradition law is marked by the five major cases described below.[38] Each case reflects the efforts of the courts and the country to come to grips with evolving norms of international human rights within the context of extradition proceedings.

In *Canada v. Schmidt*,[39] the applicant raised a challenge that, for the first time, weighed Canada's extradition treaty obligation against the protection of the individual (under the Charter) from being tried repeatedly for the same offense.[40] The case arose after U.S. authorities had requested the return of a woman from her place of refuge in the province of Ontario, for the purpose of conducting a second trial on a charge that arguably was identical to the one for which she had already been acquitted.[41]

The appellant, Helen Susan Schmidt, a Canadian, was accused in the United States of having abducted a two year old girl, Denise Gravely, from a Cleveland sidewalk in the summer of 1980.[42] The abduction was carried out with the help of Schmidt's son, Charles Gress, and a friend of her son. Schmidt took the girl to New York State, where she raised her as her own daughter. In the interim, the child's father committed suicide, allegedly as a result of his inability to discover his daughter's whereabouts.

Two years later, Schmidt attended a family reunion, accompanied by Denise. Another son of Schmidt's, Donald Gress, was also at the reunion. This

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ministerial decision to extradite a U.S. fugitive wanted on drug charges. Four years later, in *Canada v. Jamieson*, [1996] 1 S.C.R. 465, the Supreme Court reversed the judgment, stating that the Minister of Justice's surrender decision did not infringe the fugitive's rights under the Charter of Rights and Freedoms.

38. Canada did not have its own independent Constitution until 1982, and a fully operational Charter of Rights and Freedoms until 1985, when the equality rights enshrined in section 15 were brought into force. These five cases are not the only extradition cases the Court has dealt with since repatriation, but they are the cases that best reflect the evolution of the Court's doctrine of extradition in a post-Charter world.

39. [1987] 1 S.C.R. 500.

40. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 11 ("Any person charged with an offence has the right . . . if finally acquitted of the offence, not to be tried for it again and, if found guilty and punished for the offence, not to be tried or punished for it again . . . .").

41. *Schmidt*, [1987] 1 S.C.R. at 506-07. The fugitive's first trial, which produced an acquittal, had been for the U.S. federal offence of kidnapping under 18 U.S.C. § 1201 (1982). The second charge, for which the extradition was sought, was for the state offence of "child stealing" under section 2905.04 of the Revised Code of Ohio, where the offense occurred.

42. *See Schmidt*, [1987] 1 S.C.R. at 506-07.

son not only came from Cleveland but also knew the child's parents. Following the reunion, Donald Gress told Cleveland police of Denise's whereabouts. His mother was arrested shortly thereafter.

At her trial on U.S. federal kidnapping charges, Schmidt admitted the factual allegations but was acquitted by a jury based on her defense of mistake of fact. Schmidt claimed that she abducted the girl because she believed she was the illegitimate child of her son. Following the acquittal, the State of Ohio pursued a charge of "child stealing" against Schmidt. It was while this charge was pending that Schmidt escaped to Canada. She was arrested one month later in the summer of 1982. Extradition proceedings were commenced and she was ordered surrendered.

The case made its way to the Supreme Court, where Schmidt's appeal of the surrender order was dismissed. The majority held that, even though the Canada-U.S. Extradition Treaty provided that extradition is not to be ordered where a fugitive has been previously "tried and discharged or punished *in the territory of the requested state* for the offense for which his extradition is requested,"[43] it did not guard against the possibility of double jeopardy in the *requesting state*. The Court explained that,

> If the parties [to the 1971 Treaty] had considered that double jeopardy in the requesting state should be a valid defence at an extradition hearing, one would have thought the treaty would have referred to it since the parties evidently adverted to the issue. The truth is that the parties obviously understood the practical difficulties of providing for such a defence at the hearing, leaving it, like other trial matters, to be dealt with in the requesting country.[44]

In a separate opinion, Justice Bertha Wilson defined the issue before the court as whether the Extradition Treaty on which the proceedings were founded could legally trump the constitutional restraints imposed on the very government that entered into the treaty in the first place.[45] "If the participation of a Canadian court or the Canadian government is required in order to facilitate extradition," wrote Justice Wilson, "[then we] must face up to the question whether such persons have the benefit of the Charter in Canadian proceedings."[46] For Justice Wilson the answer was clear: the Constitution must be supreme when the fundamental principles of justice as reflected in the Charter are involved, even if this means denying another state its otherwise legitimate extradition request.

Justice LaForest, writing for the majority, saw the issue differently. The responsibility and duty of Canada as a member of the international community, he opined, was not to subject the "judicial process in a foreign country [to] finicky evaluations against the rules governing the legal process in this country, [be it] the presumption of innocence or [the] procedural or evidentiary safeguards [under our system]."[47] "[A]ny other approach," wrote the Justice, "would seriously impair the effective functioning of a salutary

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43. 1971 Treaty, *supra* note 18, art. 4(1)(i).
44. *Schmidt*, [1987] 1 S.C.R. at 517.
45. Ed Morgan, *In the Penal Colony: Internationalism and the Canadian Constitution*, 49 U. TORONTO L.J. 447, 453 (1999).
46. *Schmidt*, [1987] 1 S.C.R. at 533.
47. *Id.* at 522-23.

system for preventing criminals from evading the demands of justice in one country by escaping to another."[48] For Justice LaForest, Canada's responsibility to fight crime as a member of the international community was of greater importance than the normative consideration, found in both the Charter and the Canada-U.S. Extradition Treaty, against trying an individual repeatedly for the same offense.[49] To do otherwise, suggested Justice LaForest, would be tantamount to an extraterritorial application of the Charter to the criminal processes of another country.[50] Perhaps just as importantly, such a decision would nullify a history of judicial deference to the Executive in matters of extradition.

Justice LaForest's concept of the comity of nations and the theme of internationalism in the criminal process was expanded two years later in *United States v. Cotroni*.[51] As in *Schmidt*, the applicant was a Canadian citizen. But for the first time, the Court was presented with an extradition request by the United States "of a Canadian citizen for acts committed within Canada for which the accused could be prosecuted in Canada."[52] The central issue was whether a decision to surrender was an acceptable infringement of section 6(1) of the Charter of Rights and Freedoms, which guarantees a Canadian the right to remain in Canada.[53]

Frank Cotroni was arrested in Canada in 1983 after the United States requested extradition on a charge of conspiracy to possess and distribute heroin.[54] The alleged criminal conduct consisted of phone calls made by Cotroni within the confines of his home in the province of Quebec. The phone calls were made to American citizens and were said to involve planning for the purchase and importation of heroin for distribution throughout the United States.

Upon application by the United States, an order to surrender was granted which was then appealed by Cotroni. Eventually the case made its way to the Court of Appeal of Quebec, which quashed the order of committal "on the ground that the extradition of Cotroni infringed section 6(1) of the Canadian Charter of Rights and Freedoms and was not . . . justifiable as a reasonable limit under section 1 [of the Charter]."[55] That decision was appealed and the Supreme Court granted certiorari.

Writing for the majority, Justice LaForest was once again to champion the force of extradition treaties over Charter rights. While agreeing that extradition is a prima facie violation of section 6(1) and that this view is grounded in both domestic and international law,[56] Justice LaForest

48. *Id.* at 523.
49. *See* 1971 Treaty, *supra* note 18, art. 4(1)(i).
50. *Schmidt*, [1971] 1 S.C.R. at 518.
51. [1989] 1 S.C.R. 1469 (Can.).
52. *Id.* at 1508.
53. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 6(1) ("Every citizen of Canada has the right to enter, remain in and leave Canada.").
54. *Cotroni*, [1989] 1 S.C.R. at 1476-77.
55. *Id.* at 1477; *see* CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1 (guaranteeing "the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society").
56. *Cotroni*, [1989] 1 S.C.R. at 1481.

nonetheless reversed the court of appeal's decision and restored the initial order to extradite.[57]

Arguing first that the underlying principle of extradition is to ensure that "crime should not go unpunished,"[58] Justice LaForest went on to note that the trafficking in drugs "is an international enterprise and requires effective tools of international cooperation for its investigation, prosecution and suppression."[59] Any "infringement to section 6(1) that results from extradition lies at the outer edges of the core values sought to be protected by that provision."[60]

In her dissent, Justice Wilson expressed "alarm" at the characterization of an infringement of section 6(1) as "peripheral."[61] To extradite a Canadian citizen for an alleged crime committed in his own country would, Justice Wilson argued, create an unreasonable limit on Cotroni's right to claim the protection of section 6(1). To deny extradition would not be to deny justice; the suspects could be tried in a Canadian court under Canadian law.[62] While Justice LaForest felt that granting the dismissal order would be an extraterritorial exercise of Canadian Charter rights, Justice Wilson argued that under the circumstances, extradition amounted to an exercise in extraterritorial law enforcement by the other country.[63]

In *United States v. Jamieson*,[64] an American with no prior criminal record was arrested and accused of selling ten ounces of a mixture containing cocaine to an undercover police officer in Michigan.[65] After he was released on bail in 1987, Daniel Jamieson fled to Canada, where he was arrested in Montreal in 1990.[66] He then began a long battle against extradition. In 1990, Jamieson was found legally extraditable.[67] Following a lengthy challenge, the Justice Minister finally issued a surrender order in 1992. Jamieson appealed to the Quebec Court of Appeals under section 7 of the Canadian Charter of Rights and Freedoms, claiming that to be sent back to the United States would violate his right to security and liberty.[68]

At the time the appellant was charged with his offense, Michigan law imposed a twenty-year minimum jail sentence without the possibility of parole unless there existed "substantial and compelling reasons" for deviating from that minimum.[69] In reviewing Michigan case law, the Quebec Court of Appeals concluded that the appellant stood no realistic chance of establishing

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57. *Id.* at 1501.

58. *Id.* at 1483 (quoting Re Federal Republic of Germany and Rauca, [1983] 4 C.C.C. (3d) 385, 406 (Ont. Ct. App.)).

59. *Cotroni*, [1989] 1 S.C.R. at 1485.

60. *Id.* at 1481.

61. *Id.* at 1511.

62. *Id.* at 1509, 1514 ("The objective of controlling trans-border crime could have been achieved by prosecuting Cotroni . . . in Canada under section 423 of the Criminal Code and section 5 of the Narcotic Control Act.").

63. *See id.*

64. 93 C.C.C. 3d 265 (Que. C.A. 1994), *rev'd*, [1996] 1 S.C.R. 465 (Can.).

65. *Id.* at 270-71.

66. *Id.* at 272.

67. *Id.* at 270.

68. *Id.* at 271.

69. *Id.* (citing MICH. COMP. LAWS. § 333.7401(4)).

substantial and compelling reasons for departure from the minimum sentence.[70]

The test for a section 7 challenge to extradition was laid down by Justice LaForest in *Schmidt*.[71] Applying that test, the Quebec Court held that "the situation faced by appellant . . . on the charge as laid is 'shocking and fundamentally unacceptable to [Canadian] society.'"[72] A suspect tried in Canada on a similar charge would likely receive a much lesser sentence.[73] The imposition of a twenty-year minimum prison sentence with no chance of parole upon a first-time drug offender with no criminal record, the court held, would be contrary to the Canadian principle of "fundamental justice."[74] For the first time in post-Charter history, then, a Canadian court, citing another country's case law, had overturned a Minister's surrender order. The doctrine of judicial deference to the Executive in matters of extradition had been challenged. Four years later, the Supreme Court, with Justice LaForest on the bench, met the challenge and reversed the lower court's judgment, thereby restoring the historic prerogative of the Executive.

During the period Jamieson was pursuing his challenge to the Canada-U.S. Extradition Treaty, the Supreme Court was presented with two other challenges that wound up cementing the doctrine of constitutional interpretation set down by the LaForest majority in *Schmidt*.

Perhaps the most difficult issue to confront the Supreme Court in post-Charter extradition law has been the prospect of Canada sending a fugitive through the extradition process to a potential execution in a foreign country.[75] That issue was addressed head on in companion cases presented to it in 1991. In these cases, the Court addressed arguments that claimed extradition would violate the Charter's section 12 prohibition against cruel and unusual punishment and/or its section 7 guarantee of fundamental justice.

In *Kindler v. Canada*,[76] the State of Pennsylvania had convicted Joseph Kindler of murder and sentenced him to death. Kindler escaped to Canada and was subsequently captured, whereupon the Minister of Justice offered him for surrender without obtaining assurances that Pennsylvania would not carry out his execution, despite Canada's right under the 1971 Extradition Treaty to obtain such assurances.[77]

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70. *Id.* at 280.

71. Canada v. Schmidt, [1987] 1 S.C.R. 500, 522 (Can.) ("[W]here the nature of the criminal procedures or penalties in a foreign country sufficiently shocks the conscience . . . to surrender a fugitive for trial there [would breach] the principles of fundamental justice enshrined in section 7.").

72. *Id.* at 278 (citing Kindler v. Canada, [1991] 2 S.C.R. 779, 850 (Can.)).

73. *See id.* at 284.

74. *Id.* at 271. Section 7 of the Charter has no literal counterpart within the Bill of Rights, although it does suggest something similar to the jurisprudential doctrine of substantive due process. It states that "[e]veryone has the right to life, liberty and the security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 7.

75. The Canadian House of Commons supported the abolition of the death penalty in free votes held in 1976 and 1987. Prior to enactment of the Charter, the death penalty was upheld by the Supreme Court under the Canadian Bill of Rights, R.S.C., app. III (1985) (Can.), in cases involving murders of police officers or prison guards. *See, e.g.*, Miller v. The Queen, [1977] 2 S.C.R. 680 (Can.) (murder of police officer).

76. [1991] 2 S.C.R. 779 (Can.).

77. 1971 Treaty, *supra* note 18, art. 6 ("When the offense for which extradition is requested

In *Reference re Ng Extradition*,[78] California authorities wanted the fugitive for a series of particularly brutal sex-torture slayings. While reassuring the public that *Ng Extradition*, as with *Kindler*, did not indicate a wholesale abandonment of Canada's opposition to the death penalty, the Court, as it did in *Kindler*, eventually extradited Ng without article 6 assurances.[79]

In writing the majority opinion, Justice LaForest relied on the same reasoning that he had advanced in *Schmidt* and *Cotroni* in resolving the constitutional issues.[80] Despite heated views on both sides of the issue at the time in Canada, LaForest reasoned that "[i]t would be strange if Canada could expel lesser criminals but be obliged by the Charter to grant sanctuary to individuals who were wanted for crimes so serious as to call for the death penalty in their country of origin."[81] As in his earlier cases, Justice LaForest felt it was not Canada's place or job to question the judicial system of another country. The job of the country and the courts, as LaForest saw it, was to strike a balance between individual rights guaranteed by the Charter and Canada's duty to the international community—in particular the United States—to fight crime, even if this meant violating article 6 of the Canada-U.S. Extradition Treaty. "Unlike the internal situation," he wrote, this decision "takes place in a global setting where the vast majority of the nations of the world retain the death penalty."[82]

In *Kindler* and *Ng* then, the Court sustained the doctrine of international responsibility and domestic rights first established in *Schmidt*. In the name of comity, in the pursuit of justice, the Court looked to domestic and international case law and opinion to support its decision to waive Canadian Charter rights in order to honor U.S. extradition requests.[83] As these cases worked through the courts, domestic and international opinion and law were changing. Canadians no longer fully supported the death penalty. Globally,

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is punishable by death under the laws of the requesting State and the laws of the requested Sate do not permit such punishment for that offense, extradition may be refused unless the requesting State provides such assurances as the requested State considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.").

78. [1991] 2 S.C.R. 858 (Can.).

79. *Id.* Ng had only been committed for extradition and had not yet been surrendered, but Canadian Minister of Justice Kim Campbell referred his case to the Court to be decided along with *Kindler*.

80. Morgan, *supra* note 45, at 459.

81. *Kindler*, [1991] 2 S.C.R. at 834. At the time of these cases, there were conflicting domestic concerns. Many Canadians feared that to refuse extradition would result in Canada becoming a haven for killers. Justice LaForest wrote in his opinion that "[t]he Government has a right and duty to keep criminals out of Canada and to expel them by deportation." *Id.* Justice McLachlin joined the majority, noting, inter alia, "persistent calls to bring back the death penalty" as reflected in the narrow defeat of a motion in Parliament (the vote was 148 to 147) and public debate. *Id.* at 858 (McLachlin, J., concurring).

82. *Id.* at 833.

83. Appellants in both *Kindler* and *Ng* had argued, inter alia, that the "comity of nations," to which Justices LaForest and McLachlin consistently deferred, included protection against extradition where extradition meant the possibility of cruel and unusual treatment. The Court concluded that extradition by the Canadian government did not violate the section 12 Charter guarantee against such punishment because the only action by the government was to hand over the fugitives to the United States. As Canada did not impose or carry out the actual death penalty, it could not be held responsible either for the imposition or the method by which the sentence may be imposed. *Kindler*, [1991] 2 S.C.R. at 831.

more nations were rejecting capital punishment.[84] Despite the shift occurring at home and abroad, however, it would take another decade before these changes in values would become widespread enough to challenge the doctrine laid down in the previous cases.

In *United States v. Burns*,[85] the Court upheld a section 7 Charter challenge and overruled a decision by the Federal Minister of Justice to surrender two fugitives to U.S. authorities without first seeking assurances that the death penalty would either not be imposed or, if imposed, would be commuted.[86]

Glen Sebastian Burns and Atif Ahmad Rafay were wanted in connection with the 1984 murder of Rafay's parents and sister at his parents' home in the State of Washington. Washington authorities immediately considered Burns and Rafay prime suspects and they were detained. They were released after initial questioning for lack of evidence.[87] The suspects, both eighteen at the time, returned to their homes in British Columbia. Subsequent investigation by the Royal Canadian Mounted Police led to the eventual arrest of the suspects. Based on the findings of that investigation, the then-Minister of Justice Alan Rock issued a surrender order, which was appealed to the British Columbia Court of Appeals. That court ruled the surrender order unconstitutional, and the ruling was appealed to the Supreme Court.

The Supreme Court's per curiam decision in *Burns* is significant for a number of reasons: it marks the only occasion since the enactment of the Charter of Rights and Freedoms that the Supreme Court overruled a government surrender order;[88] it reversed a line of reasoning that had "extend[ed] in an unbroken line from Schmidt to Kindler;"[89] and it converted what had been a political prerogative into a constitutional imperative. In future extradition requests involving the possibility of the death penalty, the government now *must* seek article 6 assurances. Further, if the government

84. *See, e.g.*, International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171. More evidence that international legal fora are recognizing that capital punishment practices may be so cruel as to mandate the refusal of an otherwise valid extradition request comes from *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989). Soering, a West German national, murdered his girlfriend's parents in Virginia and then fled to the United Kingdom. After his surrender was ordered, he petitioned the European Commission of Human Rights, which referred the case to the European Court of Human Rights. The Court held that the U.K. was required by article 3 of the European Convention on Human Rights, which prohibits torture and inhuman or degrading treatment or punishment, not to extradite Soering because he faced such treatment by the likely fact of his being kept on death row for a prolonged period.

85. [2001] 1 S.C.R. 283 (Can.).

86. *Id.* at 356 ("Accordingly, we find that the Minister's decision to decline to request the assurances of the State of Washington that the death penalty will not be imposed on the respondents as a condition of their extradition, violates their rights under section 7 of the Charter."). Section 7 of the Charter reads: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 7. The Court also rejected appellants' challenge under sections 6 (mobility rights) and 12 (cruel and unusual punishment) of the Charter.

87. *Burns*, [2001] 1 S.C.R. at 298.

88. *See* discussion of case *supra* note 37.

89. *Burns*, [2001] 1 S.C.R. at 328 (pointing out the Court's constant and consistent "expressions of judicial deference to ministerial extradition decisions").

does invoke the "special circumstances" clause, then *it* must shoulder the burden of showing cause.

In denying extradition, the Court also expanded the doctrine of extraterritoriality. Previous Courts held that under the right balance of interests, Charter rights would dominate,[90] but the right set of circumstances never seemed to materialize. The *Burns* Court, as with past Courts, held that an observance of and adherence to the "fundamental principles of [Canadian] justice compelled its decision."[91] Unlike past Courts, however, this Court held that those principles include the view that "capital punishment is inconsistent with the sanctity of human life."[92] The fundamental principles of justice are embedded in "the basic tenets" of the Canadian legal system, argued the Court, and they should only be overruled by "exceptional circumstances."[93] When exceptional circumstances are absent, Charter rights must prevail, even if it means exercising the kind of extra-territorial jurisdiction the Court has traditionally resisted.[94] In the instant case, the Supreme Court looked to the U.S. penal system, compared it with the Canadian system, weighed the nation's perception of "fundamental principles of justice," and found the U.S. system deficient.

Underlying these shifts by the Court in its approach to extradition was a shift in the Court's view of domestic and international opinion and law. At the time *Kindler* and *Ng Extradition* were decided, despite changing values, a substantial number of Canadians still supported capital punishment. This could also be said of the international community where the majority of nations either retained the death penalty or did not object to others doing so. This reality was also reflected in international law.[95] Ten years later, the Court again looked to domestic and global realities but found that the scales of public opinion, world governments, and international law had tipped in the other direction.[96] Different circumstances provided the rationale for a different decision.

Under the LaForest Court, appeals to international law served to support the concept that individual rights were for the sovereign to grant or withhold. With *Burns*, the court asserted that international law had changed and, with it, the traditional concept of sovereignty. In regard to capital punishment,

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90. *Canada v. Schmidt*, [1987] 1 S.C.R. 500, 522 (stating that there would be circumstances under which to surrender a fugitive "would violate the principles of fundamental justice").

91. *Burns*, [2001] 1 S.C.R. at 326.

92. *Id.*

93. *Id.* at 323 ("Our analysis will lead to the conclusion that in the absence of exceptional circumstances, which we refrain from trying to anticipate, assurances in death penalty cases are always constitutionally required.").

94. *Id.*

95. *See id.* at 330 (describing the abolition of the death penalty as a major Canadian initiative and a concern common to all democracies). In *Kindler* and *Ng Extradition*, the court found domestic public opinion was divided over the death penalty issue. Internationally, a majority of nations still retained capital punishment. Thus the Court was able to use international opinion to support its decisions to surrender the fugitives without article 6 assurances.

96. *Id.* By the time of *Burns*, Canada had outlawed the death penalty and the international community was increasingly supporting abolition. New information on the rising number of wrongful death penalty convictions in the United States, and a decision by Canada to become an international lobbyist for the eradication of capital punishment, provided the Court with a substantial part of the rationale for its decision. *Id.* at 330-35, 342-47.

national interests were now seen as being aligned with the interests of the international community to protect rights that are beginning to be considered universal or transnational in nature.

B. *The United States*

As the cases above confirm the tendency of Canada's courts to look to international opinion for aid in the decision-making process, the American cases analyzed below confirm the tendency of U.S. courts, even when critically reexamining existing jurisprudence, to focus almost exclusively on domestic institutions for guidance. Where Canadian courts consult international law in weighing the competing interests of the individual and the state, American courts consult the U.S. Constitution.

The presence of individual rights in domestic statutes, however, does not necessarily translate into the actual protection of such rights. Those facing extradition from the United States often do not enjoy the full panoply of individual rights and protections provided by the U.S. Constitution in standard criminal proceedings.[97] Extradition is regarded as a prerogative of the Executive, and the courts have traditionally declined to challenge the Executive by granting fugitives important procedural protections that could delay, complicate, or even thwart the extradition process.[98] In recent years, however, some federal courts have begun to question the paucity of constitutional protections granted to fugitives in international extradition proceedings.[99] They have also begun to challenge the once exclusive power of the Executive to decide who will be extradited and who will not.

*In re Extradition of Burt*,[100] for example, involved an appeal from a denial of a petition for habeas corpus relief. The appellant had invoked the Due Process Clause of the Fifth Amendment arguing that the Government's delay in deciding to extradite him to Germany violated his due process right to

97. *See, e.g.*, Messina v. United States, 728 F.2d 77 (2d Cir. 1984) (stating that a fugitive has no right to discovery or even to cross-examination of any witness who testifies at the extradition hearing); Jhirad v. Ferrandina, 536 F.2d 478 (2d Cir. 1976) (stating that the Sixth Amendment's guarantee of a speedy trial does not apply to an extradition hearing); Merino v. United States Marshal, 326 F.2d 5 (9th Cir. 1963) (stating that Federal Rules of Criminal Procedure do not apply to extradition hearings).

98. Lis Wiehl, *Extradition Law at the Crossroads*, 19 MICH. J. INT'L L. 729, 732 (1998); *see also* United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991) ("[E]xtradition treaties are principally designed to further the sovereign interests of nations, and therefore any rights they confer on individuals are derivative of the rights of nations."), *vacated*, 505 U.S. 1201 (1992). Other U.S. cases that share the view that extradition treaties are to be "liberally" construed in favor of extraditing include *Factor v. Laubenheimer*, 290 U.S. 276, 293 (1993), which states that "a narrow and restricted construction [of the treaty] is to be avoided"; and *Villareal v. Hammon*, 74 F.2d 503, 505 (5th Cir. 1934).

99. For a more detailed analysis of court decisions over the past two decades that have challenged conventional American attitudes towards extradition and the rights of individuals caught up in that process, see John Kester, *Some Myths of U.S. Extradition Law*, 76 GEO. L.J. 1441 (1988); Robert Kushen & Kenneth Harris, *Surrender of Fugitives by the U.S. to the War Crimes Tribunal for Yugoslavia and Rwanda*, 90 AM. J. INT'L L. 510 (1996); Mary Rose Papandrea, Comment, *Standing to Allege Violations of the Doctrine of Specialty: An Examination of the Relationship Between the Individual and the Sovereign*, 62 U. CHI. L. REV. 1187 (1995); and Wiehl, *supra* note 98.

100. 737 F.2d 1477 (7th Cir. 1984).

be free from unjustified prosecutorial delay, especially because the Government had made an earlier, tentative decision not to extradite him.[101]

The *Burt* panel held that federal courts undertaking habeas corpus review of extraditions do "have the authority to consider not only procedural defects in the extradition procedures that are of constitutional dimension, but also the substantive conduct of the United States in undertaking its decision where such conduct violates constitutional rights."[102]

In *Parretti v. United States*,[103] the Ninth Circuit broke new ground. Giancarlo Parretti was arrested on October 18, 1995. The warrant against Parretti authorized his provisional arrest so that he could be held to answer an anticipated formal request by French authorities for his extradition to France. Parretti was wanted in connection with fraud and embezzlement charges stemming from his heavily leveraged purchase of MGM-United Artists.[104] The circuit court held that the Fourth Amendment prohibition against illegal seizures is violated whenever a court issues a warrant for the provisional arrest[105] of an international fugitive in an extradition matter without a prior evidentiary showing by the Government of probable cause.[106]

The *Parretti* court also declared unconstitutional a longstanding presumption at law that a fugitive arrested on an extradition warrant should be denied bail after arrest.[107] Defendants in domestic criminal cases have benefited from procedural protections favoring a defendant's pretrial release on bond[108] and the requirement that the burden be on the government to show cause for denying bail.[109] The *Parretti* court held that not only does denial of bail in an extradition proceeding violate the Due Process Clause of the Fifth Amendment, but that henceforward, the Government would bear the burden of showing that the fugitive should not be granted bail.[110] While the *Parretti*

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101. *Id.* at 1480.

102. *Id.* at 1484.

103. 112 F.3d 758 (9th Cir. 1997).

104. *Id.* at 761.

105. As Lis Wiehl explains:

> Most arrest warrants in extradition proceedings are termed "provisional" because the federal extradition statute allows foreign authorities to request the issuance of a warrant of arrest for a fugitive by U.S. authorities even before the foreign authorities have transmitted to the U.S. the formal package of documents in which the justification for arrest is detailed in full.

*See* Wiehl, *supra* note 98, at 731 n.2.

106. *Parretti*, 112 F.3d at 773. The Warrant Clause states that "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. The clarity of this language allows for no exceptions, regardless whether the government's purpose in making the arrest is to enforce treaties or our own domestic laws. *See* Vernonia Sch. Dist. v. Acton, 515 U.S. 646 (1995) ("Warrants cannot be issued, of course, without the showing of probable cause required by the Warrant Clause.").

107. *See* Wiehl, *supra* note 98, at 754 n.82 ("The extradition statutory scheme, 18 U.S.C. § 3184 (1994), does not address the question of bail. And, because international extradition matters are not considered criminal cases, courts have held that the Bail Reform Act . . . which governs the allowance of bail in domestic criminal case[s] . . . does not apply in extraditions.").

108. Bail Reform Act, 18 U.S.C. § 3142 (1994).

109. U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime...nor be deprived of life, liberty, or property, without due process of law."). This is perhaps analogous to section 7 of the Canadian Charter of Rights and Freedoms.

110. *Parretti*, 112 F.3d at 781.

decision has been distinguished,[111] it has never been overruled by the Supreme Court.

Another traditional part of extradition law being challenged as unconstitutional is the so-called "doctrine of noninquiry." Under this rule, courts determining whether a defendant is extraditable may not examine the political or judicial system of the requesting state.[112]

The noninquiry rule originated in 1901 when the Supreme Court, in *Neely v. Henkel*, held that Americans prosecuted abroad were not entitled to all the protections afforded by United States procedural requirements.[113] Extending American protections abroad in matters of extradition was considered an unacceptable exercise of extraterritoriality. Proponents of this doctrine argue that U.S. courts should not question the quality of another nation's court system or the motives behind its decision to extradite.[114] As the following Section discusses, recent decisions and commentary suggest U.S. courts are beginning to entertain other ideas about the doctrine of noninquiry.

In *Gallina v. Fraser*,[115] the Second Circuit stated that it could "imagine situations where [a defendant], upon extradition, would be subject to procedures or punishments so antipathetic to a federal court's sense of decency as to require reexamination of the [noninquiry rule]."[116] Such a "situation" was presented to the First Circuit in 1997. In *United States v. Lui Kin-Hong*,[117] the appellant argued that because the alleged crime occurred prior to China taking control of Hong Kong, he should not be sent back to face trial under a Chinese judicial system that was disproportionately prejudiced to his case. The Court agreed and overturned his surrender order.

*Lui Kin-Hong* and the aforementioned cases reflect recognition by at least some American courts that there is a problem with the lack of rights extended to individuals who are targets of extradition requests. The answer to the problem has been an attempt to extend rights and protections that already exist under the Constitution. These cases, however, remain the exception, not the rule. Those subject to extradition requests on American soil often find that otherwise broad constitutional protections are narrowly construed in the extradition domain.

In *Martin v. Warden of Atlanta Pen*, Canada requested the extradition from the United States of a fugitive wanted for "criminal negligence causing death and leaving the scene of an accident."[118] Extradition was sought

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111. *See* Lopez-Smith v. Hod, 121 F.3d 1322, 1325 (9th Cir. 1997).

112. For a defense of the noninquiry rule, see Jacques Semmelman, *Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 CORNELL L. REV. 1198 (1991). Compare that with Justice LaForest's view on the doctrine of noninquiry, as explained in *Argentina v. Mellino*, [1987] 1 S.C.R. 536, 554-55 (Can.), in which he states that "[t]he assumption that the requesting state will give the fugitive a fair trial . . . underlies the whole theory and practice of extradition . . . [the] extradition judge should not give effect to any suggestion that the proceedings are oppressive or that the fugitive will not be given a fair trial."

113. Neely v. Henkel, 80 U.S. 109, 122-23 (1901).

114. *See, e.g.*, Glucksman v. Henkel, 221 U.S. 508, 512 (1911) ("We are bound by the existence of an extradition treaty to assume that the trial will be fair.").

115. 278 F.2d 77 (2d Cir. 1960).

116. *Id.* at 79.

117. 110 F.3d 103 (1st Cir. 1997).

118. Martin v. Warden of Atlanta Pen, 993 F.2d 824, 825-26 (11th Cir. 1993).

seventeen years after initial criminal charges were brought against the accused. The Eleventh Circuit declined to acknowledge the appellant's Sixth Amendment right to a speedy trial in the extradition context and dismissed rights contained in the Canada-U.S. Treaty.[119]

Perhaps the most controversial and widely publicized exercise of irregular rendition occurred in the case of *United States v. Alvarez-Machain*.[120] In the spring of 1990, Dr. Humberto Alvarez-Machain was abducted from his office in Guadalajara and driven to Mexico City. He was then put on a plane and flown to El Paso, Texas, where U.S. authorities were awaiting his arrival.[121] Dr. Alvarez-Machain was wanted in the death of a U.S. Drug Enforcement Administration ("DEA") agent. It was alleged that the Doctor helped keep the DEA agent alive so that the agent could continue to be tortured. Dr. Alvarez-Machain filed a motion arguing that the Court lacked personal jurisdiction over him because he was forcibly abducted in violation of his due process rights, and because the abduction violated the extradition treaty between the United States and Mexico.[122]

The Supreme Court, in an opinion written by Chief Justice Rehnquist, held that the extradition treaty did not explicitly forbid unilateral abduction and that neither the language nor the history of the U.S.-Mexico Extradition Treaty supported an implied prohibition on acquiring jurisdiction outside of its terms.[123] The Court rejected the appellant's due process claim, citing a legal doctrine established in the nineteenth century that holds that a U.S. court will impose virtually no restrictions on how U.S. officials obtain custody over fugitives.[124]

The fallout from this landmark case was widespread, swift, and lasting. The United States came under intense criticism for violating the ancient and internationally recognized tenet of the inviolability of a sovereign nation, a tenet that the United States regularly preached to the rest of the world. Commentators and governments suggested then and hold now that *Alvarez-Machain* also revealed the truth behind America's stated preference for bilateral treaties over more comprehensive international law. The truth, it was argued, was that the United States regarded bilateral treaties as mere formalities that left it free to engage in irregular acts of rendition at will.[125]

The finding in *Alvarez-Machain* particularly outraged Canada, which feared that the ruling conferred a new authority upon the United States to

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119. *Id.* at 829 ("[Defendant has] no Sixth Amendment right to a speedy trial in extradition cases . . . [e]ven if a treaty states that the person whose extradition is sought shall have the right to use all remedies and recourses provided by the law of the Requested State.") (citations omitted).

120. 504 U.S. 655 (1992).

121. *Id.* at 657.

122. *Id.* at 657-58.

123. *Id.* at 665-66.

124. Ker v. Illinois, 119 U.S. 436, 444 (1886). In this case, an agent of the United States was sent to Peru to bring back Ker, with the necessary papers of procurement in hand. Once in Peru, the agent seized Ker, without mentioning the papers to Ker or the Peruvian government, and delivered the suspect to U.S. officials. Since the agent did not act under color of the government, and did not profess to act under the treaty, the Court found that he was acting without pretense of U.S. authority. Ker was not permitted to challenge the legality of a U.S. trial.

125. *See* Jami Leeson, *Refusal to Extradite: An Examination of Canada's Indictment of the American Legal System*, 25 GA. J. INT'L & COMP. L. 641, 650 (1996).

abduct individuals from foreign territories of its choosing.[126] Canada perhaps had special reason to be worried. Four years earlier, it had had its own run-in with the United States over kidnapping, the result of which was to win a promise and commitment from the United States not to kidnap again.[127] It now appeared that the promise had been broken.

In *Jaffe v. Smith*,[128] the appellant was convicted of land sale violations and failure to appear at trial in Florida. After securing bond, Sidney Jaffe fled to his home in Canada. The court then prompted the bond company to go after Jaffe. Two professional bail bond recovery agents (i.e., bounty hunters) were subsequently hired to achieve that goal. The bondsmen did not act pursuant to the Extradition Treaty between the two states, nor did they carry papers pertaining to Jaffe's extradition when they entered Canada.[129] Nevertheless, they did manage to apprehend him.

The fugitive filed a habeas corpus petition claiming that he was abducted in violation of the Canada-U.S. Extradition Treaty. The U.S. Supreme Court denied the petition, stating that "[i]n essence the law is not concerned with the manner in which a criminal defendant finds his way into court."[130] The defendant's claim that the bounty hunters were agents of the State was also rejected, and Jaffe was subsequently convicted of all charges,[131] despite formal objections from Canada. In an unexpected twist, however, the two bounty hunters were extradited to Canada on a charge of kidnapping.[132]

In summary, a growing recognition that individuals targeted for extradition lack certain rights has prompted courts in the United States and Canada to challenge the status quo of extradition law, including the traditional final say of the Executive in matters of extradition.

## IV. THE FUTURE OF EXTRADITION IN CANADA AND THE UNITED STATES: OPTIONS

### A. *Do Nothing*

While some commentators propose the creation of new bodies, or at least the modification of existing ones, in order to punish international and extraterritorial criminals,[133] others suggest that the most reasonable course of

126. Brief of the Government of Canada as Amicus Curiae in Support of Respondent, Alvarez-Machain, United States v. Alvarez-Machain, 504 U.S. 655 (1992) (No. 91-712), *reprinted in* 31 I.L.M. 921 (1992) (challenging the Court's decision creating a right to prosecute after abduction in breach of extradition treaty).

127. 1988 Protocol, *supra* note 21 (stating that transborder kidnappings by bounty hunters are extraditable offenses under the 1971 Treaty).

128. 825 F.2d 304 (11th Cir. 1987).

129. *Id.* at 305-7.

130. *Id.* at 307.

131. Wade A. Buser, Note, *The Jaffe Case and the Use of International Kidnapping as an Alternative to Extradition*, 14 GA. J. INT'L & COMP. L. 357, 373-74 (1984).

132. Kear v. Hilton, 699 F.2d 181 (4th Cir. 1983).

133. *See* Justice Louise Arbour, *The Need for an Independent and Effective Prosecutor in the Permanent International Criminal Court*, 17 WINDSOR Y.B. ACCESS TO JUST. 207 (1999); Molly McConville, Note, *A Global War on Drugs: Why the United States Should Support the Prosecution of Drug Traffickers in the International Criminal Court*, 37 AM. CRIM. L. REV. 75 (2000).

action is to retain the current system of extradition.[134] For the latter group, the best action is no action; their advice is to "do nothing" except stick to the status quo. This approach is based "neither on the belief that the current system is perfect, nor that it is the ideal way to handle . . . extradition."[135] It is instead based on the belief that the current treaty system accomplishes what it was designed to do. "It functions because States have found ways to work around the treaties when abiding by the terms of the treaties is not feasible."[136] The advantage to this option is that it allows states to engage in irregular rendition, including kidnapping, according to immediate needs.

The problem with this approach, however, is that it almost certainly guarantees continued friction between the United States, Canada, and other nations who have adopted a more internationalist approach and are increasingly refusing to extradite suspects wanted in the United States because of perceived deficiencies in the U.S. justice system under emerging international standards.[137]

### B. *Enhance Individual Rights at the Expense of the State*

Despite the need to protect individual rights internationally, courts remain essentially state-run institutions. Asking them to apply international law at the expense of states is considered an unrealistic proposition at this point. However, when citizens of Canada and the United States witness their own countries acting to suppress protest directed toward elements of globalization,[138] or violating another state's laws with impunity by kidnapping a fugitive, they may begin to question whether the interests of the state justify this subordination of individual rights. The United States may indeed possess the most liberal constitutional rights in the world. But if its citizens see the state, the nominal protector of these rights, continually violate them when interacting with citizens of other countries, they may begin to wonder how secure their own rights are. When either of these states "disavows its duty to guard and respect" those fundamental principles that are "the mark of a free people," it denies its own tradition "and forfeit[s] [its] standing to urge others to secure the protections of that tradition for themselves."[139]

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134. *See* Leeson, *supra* note 125; Monica L. McHam, Comment, *All's Well that Ends Well: A Pragmatic Look at International Criminal Extradition*, 20 HOUS. J. INT'L L. 419 (1998); Patel, *supra* note 16.

135. McHam, *supra* note 134, at 426.

136. *Id.* at 426-27.

137. Matthew Henning, *Extradition Controversies: How Enthusiastic Prosecutions Can Lead to International Incidents*, 22 B.C. INT'L & COMP. L. REV. 347, 347 (1999) ("The outrage felt in the U.S. . . . is symptomatic of the escalating frustration that U.S. law enforcement officials and politicians have faced in the last two decades as . . . international prosecutions have run into delays or have been defeated by foreign courts' refusals to extradite."); *see also* United States v. Cobb, [2001] 1 S.C.R. 587 (Can.) (denying extradition of suspects wanted on charges of fraud and conspiracy to commit fraud because the U.S. judge and prosecutor had placed undue pressure on Canadian citizens to forego due legal process in Canada, in violation of section 7 of the Charter of Rights and Freedoms).

138. See, for example, events surrounding the 2000 meeting of the World Trade Organization in Seattle, where greater globalization without greater input from affected citizens led to mass street demonstrations, and the debate surrounding the April, 2001 meeting of the Organization of American States in Quebec, where the creation of a hemispheric economic zone topped the agenda and where citizens protested their exclusion from that discussion.

139. Lee v. Weisman, 505 U.S. 577, 592 (1992).

### C. *Liberalism: Balancing Interests*

It has been argued that in order for international law to work properly to protect human and civil rights, "the state must be a trustworthy representative of the interests of its individuals."[140] According to this theory of liberalism, the central concern in the international law context "is the relationship between states and the individuals they represent."[141] The existence of the state in this theory depends on a social contract "in which individuals recognize the value of establishing an autonomous state authority that is then entitled to exercise power over them so long as their fundamental rights are preserved."[142] It is understood that each state will in turn serve as an agent in the international realm in order to protect the individual.

This theory further assumes that in reaching this balance of international, state, and individual interests, the state will surrender some of its sovereignty. In turn, the state is given greater latitude to inquire into the legal and political process of other states. In the extradition process, for example, courts would be given the right to inquire into conditions of a requesting state. If those conditions were found not to be up to international standards, the court could refuse to extradite. This approach is exemplified in several recent U.S. and Canadian Supreme Court decisions involving extradition requests originating in the other country: *United States v. Burns*,[143] *United States v. Cobb*,[144] and a potentially chilling U.S. district court decision against Canada in *United States v. Pitawanakwat*.[145]

Finally, this approach to international law and extradition leaves the door open to greater use of another compromise solution called "conditional extradition."[146] Under this approach, a requested state is allowed to monitor the treatment of extraditees after their return to the requesting state.[147] Attaching conditions may not make the process any less controversial or displeasing to the requesting state, but it has not proved to be an impenetrable barrier to compromise. When the U.S. extradited Ziad Abu Eain to Israel in 1981,[148] for example, the Executive secured an undertaking from Israel that he would be tried by a civilian court, not a military court, and that he would be accorded all the fair trial rights required by human rights conventions.[149] In

140. Papandrea, *supra* note 99, at 1188, 1204, 1206.
141. *Id.*
142. *Id.*
143. [2001] 1 S.C.R. 283 (Can.).
144. [2001] 1 S.C.R. 587 (Can.).
145. 120 F. Supp. 2d 921 (D. Or. 2000). Canadian authorities requested extradition of defendant, a Canadian citizen who had violated terms of his parole. The District Court for Oregon held that the defendant's offenses fell within the political offense exception to extradition and denied Canada's request. In this case, the magistrate held that he did have authority to conduct an inquiry into the political and legal conditions in Canada as they pertained to defendant's claims. The fugitive was wanted in Canada for violating terms of parole by leaving the country. He had been sentenced in 1997 for actions that took place during a standoff between police and natives in British Columbia. He was convicted of firing a rifle at a police helicopter and for travelling with an illegal weapon. The district court ruled that the fugitive's original actions amounted to a political offense, as defined in the Extradition Treaty, and refused to extradite. *Id.*
146. *See* Dugard & Van den Wyngaert, *supra* note 12, at 205-07.
147. *Id.*
148. Eain v. Wilkes, 641 F.2d 504, 504-05 (7th Cir. 1981), *cert. denied*, 454 U.S. 894 (1981).
149. *See* United Nations: General Assembly Resolution and Notes Verbal on the Extradition

1996, the Canadian government extradited a Canadian national, Dennis Hurley, to Mexico[150] on the condition that Mexico agree, in writing, to take "all reasonable measures to ensure [his] safety while in detention," to permit his counsel and Canadian Embassy officials to visit him and communicate with him "at any reasonable time," and to "make its best efforts" to ensure that he was brought to trial and tried "expeditiously."[151] As one commentator has noted, conditional extradition is far from perfect,[152] but it allows the requested state to respect its due process, civil, and other obligations under international law without abandoning its support for international cooperation in law enforcement.

## V. CONCLUSION

In many cases, the United States and Canada are exemplary in extending rights to their citizens; but when it comes to extradition, history has shown that both nations are more willing to dispose of individual rights and liberties, be they contained in the Constitution, the Charter, or the Canada-U.S. Extradition Treaty, than to protect them. In recent years, however, both Canadian and American courts have begun to challenge the status quo. Still, for a significant shift to occur, developments on the international stage will need to be more openly embraced. For at the heart of the debate over the future of extradition is the debate over the idea of sovereignty itself. The traditional concept of sovereignty is "the power of a state to decide for itself, without any outside interference, subject only to internal democratic processes and institutions, what system of government and related institutions it will have and the extent to which it will exercise that sovereign power within is territorial boundaries."[153] This concept of state sovereignty remains a cornerstone of international law. In the past fifty years, however, the concept has undergone a major reassessment. As this Note has shown, one area of law that is beginning to reflect a new understanding of sovereignty is extradition. As the United States and Canada continue to negotiate extradition practices, increasing recognition of the rights of individuals as taking precedence over the rights of states is leading to a transformation of extradition policies. Modern judges are increasingly taking into account new international norms and human rights-based standards that may result in increasingly effective protection of individual rights by both domestic and international institutions. Given the internationalization of crime and terrorism, and the tremendous resources dedicated by the states to fight against this trend, the increasing recognition of individual rights in extradition law may indeed be an encouraging, if not necessary, development.

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of Mr. Eain, Feb. 12, 1982, 22 I.L.M. 442, 444-45.

150. Press Release, Department of Justice Canada, Minister of Justice Orders Surrender of Dennis Hurley to Mexico (Feb. 27, 1996), *available at* http://canada.justice.gc.ca/en/news/nr/1996/hurley.html.

151. *Id.*

152. Dugard & Van den Wyngaert, *supra* note 12, at 208.

153. Donat Pharand, *Perspectives on Sovereignty in the Current Context: A Canadian Viewpoint*, 20 CAN.-U.S. L.J. 19, 19-22 (1994).